

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARIAM A. PATTERSON and
H. J. PATTERSON,

Appellants,

VS.

EDWARD STROECKER, as Trustee of
the Estate of H. J. Patterson,
a Bankrupt,

Appellee.

BRIEF ON BEHALF OF APPELLANTS.

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FRANK D. MONCKTON, Clerk.

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F. D. Monckton,

Clerk.

No. 2923

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Statement of the Case.

This is an equitable action by Edward Stroecker as trustee of the estate of H. J. Patterson, a bankrupt, for the purpose of procuring for the benefit of creditors of the bankrupt, a one-quarter interest in the Daly Bench placer mining claim, situate near Fairbanks, Alaska, together with gold dust of the value of \$5174.66, extracted by lessees from the claim.

The lower court found against the trustee on his claim to the quarter interest in the claim and

for him on his claim to the gold dust. From the judgment below defendants there appeal.

The evidence on the trial showed:

September 19, 1910, James Wickersham owned the Daly Bench placer claim, and on this date agreed with H. J. Patterson to convey to him an undivided quarter interest in this claim if Patterson would at his own expense sink a hole to bed rock and perform the assessment work for 1910 upon it (Tr. 49).

On the same day H. J. Patterson agreed with Mariam Patterson, his wife, that if she would pay with her own money, for sinking said hole and performing said work, she should receive and be the owner of said quarter interest (Tr. 95).

September 20, 1910, at the expense of Mariam Patterson, pursuant to said agreement between her and her husband, a hole 103 feet deep was sunk with a steam drill, but did not reach bed rock. The day following another hole 123 feet deep to bed rock was sunk at the expense of Mrs. Patterson (Tr. 144).

September 21, 1910, Mrs. Patterson paid out of her own funds to the driller, \$225 for sinking the two holes (Tr. 95).

Before the said work was completed Wickersham left the Fairbanks District and did not return until September, 1911, when H. J. Patterson requested of him a deed to Mrs. Patterson for said quarter interest (Tr. 96).

October 14, 1911, Wickersham, without the knowledge or consent of Mrs. Patterson, made the deed to H. J. Patterson as grantee, and delivered this deed to H. J. Patterson on November 10, 1911, consenting at this time that H. J. Patterson convey said quarter interest to Mrs. Patterson (Tr. 97, 98, 100).

November 27, 1911, H. J. Patterson executed and delivered a quitclaim deed for the quarter interest to Mrs. Patterson, the consideration for said deed being the money paid by Mrs. Patterson for making the holes on the claim in 1910 (Tr. 100).

October 12, 1911, Wickersham executed and on November 10, 1911, delivered to H. J. Patterson without the knowledge or consent of Mrs. Patterson, a lease of said claim, reciting the ownership thereof of a quarter interest in H. J. Patterson, reserving 25 per cent of the gross output as royalty. This royalty, on January 29, 1912, before any gold had been produced, was reduced to 20 per cent (Tr. 56, 96, 102).

November 27, 1911, prior to the delivery of the deed from H. J. Patterson to Mrs. Patterson, H. J. Patterson assigned the said lease to one H. C. Hamilton, including in this sublease agreement, the one-quarter interest of Mrs. Patterson, as well as the three-quarter interest of Wickersham, and reserving, by the terms of the instrument, to himself a royalty of 5 per cent, of the gross output of gold, in addition to the royalty required to be

paid Wickersham under the lease. At the time of making this sublease agreement no gold had been extracted from the claim and no rent or royalty had accrued (Tr. 71).

May, 1912, the first cleanup was had, at which Mrs. Patterson was present demanding 5 per cent thereof as hers, because of her quarter interest in the claim and the agreement between H. J. Patterson and Hamilton (Tr. 99).

Hamilton had theretofore been enjoined in this action from paying said 5 per cent, and on this account refused to pay the 5 per cent to Mrs. Patterson and thereafter, under an order of court, deposited 5 per cent of each cleanup with the clerk of the court until \$5174.66 had been thus deposited. H. J. Patterson never demanded or claimed for himself any part of said \$5174.66.

Neither Mrs. Patterson nor H. J. Patterson have received any of the gold taken from said claim (Tr. 99).

From these facts the court found that at all times from and after September 21, 1910, Mariam A. Patterson was the bone fide sole owner of an undivided quarter interest in the Daly Bench claim, but that her husband, H. J. Patterson, was entitled to and owned the royalty of \$5174.66 paid into court by Hamilton under the sublease agreement of November 27, 1911, and that this sum should be delivered to the plaintiff, trustee, for the benefit of the creditors of H. J. Patterson.

Assignment of Errors.

The appellants rely upon the following errors:

1.

The court erred in refusing to make the finding of fact set forth in paragraph 13 of defendants' proposed findings of fact and conclusions of law, as follows:

That on November 27, 1911, but prior to the execution and delivery of said deed from H. J. Patterson to Mariam A. Patterson of said quarter interest, the said H. J. Patterson found himself unable to carry on mining operations on the Daly Bench under the lease from Wickersham, whereupon, with the consent of said Wickersham he assigned said lease to H. C. Hamilton without receiving or being promised any consideration therefor, and without reserving any interest therein to himself; that at the same time and by the same instrument he leased to the said H. C. Hamilton the quarter interest conveyed by Wickersham, the legal title to which was then standing in his name, and reserved for said quarter interest a rent or royalty of 5 per cent of the gross output to be produced by said Hamilton in his mining operations; that at said time no gold had been extracted from said ground and no rent or royalty had accrued.

2.

The court erred in refusing to make the finding of fact set forth in paragraph 14 of defendants' proposed findings of fact, as follows:

That said lease to Hamilton of said quarter interest was made without the knowledge on consent of Mariam A. Patterson, but prior to the extraction of any gold from said ground she assented to take 5 per cent of the gross output as rent or royalty for her quarter interest in said claim.

3.

The court erred in refusing to make the finding of fact set forth in paragraph 15 of defendants' proposed findings of fact, as follows:

That at the time of the execution and delivery of said deed from H. J. Patterson to Mariam A. Patterson, no gold had been extracted from said ground and no rent or royalty had accrued; that the first cleanup of gold thereon was made in May, 1912, by said Hamilton.

4.

The court erred in refusing to make the finding of fact set forth in paragraph 16 of defendants' proposed findings of fact, as follows:

That at said first cleanup of gold said Mariam A. Patterson was present and demanded from said Hamilton 5 per cent of the gross amount thereof as royalty for her quarter interest, which said Hamilton would have given her then and there had he not been enjoined by order of court in this action from doing so; instead of giving it to her, pursuant to the same order, he deposited at each cleanup 5 per cent of the amount produced by him

and his partners on said claim in court; that the total amount of gold so deposited by him in court, which has been converted into money, is \$5174.66, which fund is still in the registry of this court.

5.

The court erred in refusing to make the finding of fact set forth in paragraph 17 of defendants' proposed findings of fact, as follows:

That said H. J. Patterson at no time demanded any part of the output of said claim and at no time has he claimed to be entitled to receive any part thereof since he executed and delivered to Mariam A. Patterson a deed to said quarter interest.

6.

The court erred in refusing to make the finding of fact set forth in paragraph 18 of defendants' proposed findings of fact, as follows:

That after H. J. Patterson had assigned the Wickersham lease to Hamilton, the latter, with the knowledge and consent of Wickersham sublet a strip of said claim 250 feet in width to the Smith Brothers; that thereafter, but prior to January 1, 1912, said H. J. Patterson agreed with the Smith Brothers that he would assist them financially in their mining operations, and as compensation therefor they agreed that said H. J. Patterson should receive 5 per cent of the gross output produced by them in mining on said strip; that after assisting them to the extent of \$1400, said H. J. Patterson

found himself unable to perform his part of the agreement and thereupon it was mutually agreed that said contract was annulled, and said H. J. Patterson thereupon relinquished all claim to any part of their output; that thereupon said H. C. Hamilton entered into partnership with said Smith Brothers and financed their mining operations and mined said strip; that after the annulment of said agreement between the Smith Brothers and H. J. Patterson the latter made no further claim to any part of the output of gold produced by any mining operations upon said ground; that at the time said agreement was annulled no gold had been extracted from said ground.

7

The court erred in refusing to make the finding of fact set forth in paragraph 19 of defendants' proposed findings of fact, as follows:

That neither Mariam A. Patterson nor H. J. Patterson have received any part of the gold mined upon said Daly Bench by Hamilton and his partners or by any other person, nor has any rent or royalty been paid to them or either of them.

8.

The court erred in refusing to find as a conclusion of law what is set forth in paragraph 9 of defendants' proposed conclusions of law, which is as follows:

That when H. J. Patterson executed and delivered to Mariam A. Patterson a deed to the quarter

interest the latter became entitled to all rents and royalties reserved to said quarter interest in the lease from H. J. Patterson to H. C. Hamilton accruing subsequent to the delivery of said deed.

9.

The court erred in refusing to find as a conclusion of law what is set forth in paragraph 12 of defendants' proposed conclusions of law, which is as follows:

That Mariam A. Patterson is entitled to receive the fund of \$5174.66 now in the registry of this court, it being 5 per cent of the gross output of gold produced by H. C. Hamilton and his partners in mining upon said Daly Bench under the lease of said quarter interest made to him by H. J. Patterson prior to the conveyance of the legal title thereto to Mariam A. Patterson and that all of said royalty accrued after the making and delivery of said conveyance.

10.

The court erred in refusing to find as a conclusion of law what is set forth in paragraph 13 of defendants' proposed conclusions of law, which is as follows:

That defendants are entitled to judgment that plaintiff's action be dismissed.

11.

The court erred in overruling the defendants' objections to the finding of fact number 8 of the

findings of fact filed in this cause, and in making the same, which is as follows:

That the defendant Mariam A. Patterson was informed of and had knowledge of the terms and conditions of the lease from said Wickersham to H. J. Patterson, dated 12 October, 1911, and knew the terms and conditions thereof and had knowledge of and was fully informed of the terms and conditions of the assignment of said lease from said H. J. Patterson to said H. C. Hamilton dated 27 November, 1911, and assented thereto.

12.

The court erred in overruling the defendants' objections to the finding of fact number 10 of the findings of fact filed in this cause, and in making the same, which is as follows:

That the said H. J. Patterson did not at any time assign, transfer or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton wherein said H. J. Patterson reserved to himself five per cent of the gross output of said claim and no transfer of said five per cent of the gross output of said claim was ever made by said H. J. Patterson to said Mariam A. Patterson.

13.

The court erred in overruling defendants' objections to that part of conclusion of law number 1 of the conclusions of law made and filed in this

cause, and in making the same, which reads as follows:

“Subject to the terms and conditions of that certain lease from James Wickersham to H. J. Patterson dated 12 October, 1911.”

14.

The court erred in overruling defendants' objection to conclusion of law number 2 made and filed in this cause, and in making the same, which is as follows:

That the five per cent of the gross output of the gold and gold dust extracted from said Daly Bench, reserved by said H. J. Patterson in his contract with H. C. Hamilton dated 27 November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

15.

The court erred in overruling defendants' objections to conclusion of law number 3, made and filed in this cause and in making the same, which is as follows:

That the deed from H. J. Patterson to Mariam A. Patterson, dated 27 November, 1911, did not transfer to said Mariam A. Patterson any part of the five per cent of the gross output of the Daly Bench reserved by said H. J. Patterson under his contract with H. C. Hamilton of even date therewith, and said Mariam A. Patterson acquired no

right, title or interest in or to said five per cent of the gross output of said claim under and by virtue of the terms of said deed from said H. J. Patterson.

16.

The court erred in overruling defendants' objections to that part of conclusion of law number 4 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

"That said Mariam A. Patterson has no right, title or interest in or to any part of the gold or gold dust or the proceeds thereof now in the registry of the court in this cause."

17.

The court erred in overruling defendants' objections to conclusion of law number 5 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That all the moneys and gold dust now in the registry of this court in this cause are the property of the plaintiff in this action as trustee for the creditors of H. J. Patterson, a bankrupt, and should be paid and delivered to plaintiff herein to be disposed of by him in the manner directed by law, in his representative capacity as trustee for said creditors.

18.

The court erred in overruling defendants' objections to that part of conclusion of law number 6

of the conclusions of law made and filed in this cause, and in making the same, which is as follows:

“And the defendant H. J. Patterson was her agent and said Mariam A. Patterson is bound by all the acts and things done by the said H. J. Patterson in connection with said interest.”

19.

The court erred in overruling the defendants' objections to that part of conclusion of law number 7 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

“Subject to all the burdens theretofore placed upon the same by her said agent H. J. Patterson and said Mariam A. Patterson under and by virtue of said deed did not acquire any right, title or interest in or to any of the royalties, moneys or gold dust reserved to said H. J. Patterson under and by virtue of the lease to said H. J. Patterson from James Wickersham *from James Wickersham*, or the transfer thereof to said H. C. Hamilton and the agreement with H. C. Hamilton, which said last mentioned agreement was dated 27 November, 1911.”

20.

The court erred in overruling the defendants' objections to conclusion of law number 9 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That plaintiff herein is entitled to a judgment of this court decreeing him to be the owner, as trustee for the creditors of said H. J. Patterson, a bankrupt, and entitled to the possession of all the gold and gold dust and proceeds of gold dust now in the registry of this court in this cause, amounting to the sum of \$5174.66, and for an order directing the clerk of this court to pay and deliver to said plaintiff all the moneys and gold dust now held by said clerk in said cause as aforesaid.

21.

The court erred in overruling defendants' objections to conclusion of law number 10 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That plaintiff is entitled to entry of a judgment against defendants and each of them for all his costs incurred in this action.

22.

The court erred in making, rendering and entering the following part of a judgment a decree in favor of the plaintiff and against the defendants, which is as follows:

"That the deed to the said property from H. J. Patterson to Mariam A. Patterson of date the 27th day of November, 1911, was subject to the terms and conditions of a certain lease from James Wickersham to H. J. Patterson, dated the 12th day of October, 1911, and no royalties were reserved

by the owner of said interest so conveyed to Mariam A. Patterson under the terms and conditions of said lease, and the five per cent of the gross output of all the gold and gold dust extracted from said Daly Bench reserved by H. J. Patterson in his contract with H. C. Hamilton dated the 27th day of November, 1911, was reserved to said H. J. Patterson as lessee of said Daly Bench and not as the owner of an interest therein.

That Mariam A. Patterson has no right, title or interest either legal or equitable in or to the gold and gold dust or the proceeds thereof impounded with the clerk of this court in this action, amounting to the sum of \$5174.66, and that the creditors of H. J. Patterson, a bankrupt, are the owners thereof, and the plaintiff in this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is entitled to the possession thereof, for the purpose of distributing the same in the manner prescribed by the bankruptcy laws, and that the clerk of this court be, and he is, hereby ordered and directed to pay to the plaintiff herein, as trustee for the creditors of H. J. Patterson, a bankrupt, on the first day of November, 1916, all moneys now in the hands of the clerk of this court impounded in this cause, less such percentage thereof as said clerk is by law entitled to receive for impounding the same, unless said defendant Mariam A. Patterson has, on or before the said date filed with the said clerk of said court a supersedeas bond on appeal in this cause, duly approved by this court

being for such sum as may hereafter be fixed by order of the court.

That the plaintiff *is* this action, as trustee for the creditors of H. J. Patterson, a bankrupt, is the owner of five per cent of all the gold and gold dust extracted from said Daly Bench subsequent to the adjudication of said H. J. Patterson, a bankrupt, reserved to said H. J. Patterson under said contract of said H. J. Patterson with H. C. Hamilton, of date the 27th day of November, 1911, from all persons working said ground under said contract.

That the plaintiff herein be, and he is, hereby given and granted judgment against the defendants, and each of them, for all his costs incurred in this action, to be taxed by the clerk of this court.

23.

The court erred in not making, rendering and entering a decree in favor of the defendant Mariam A. Patterson and against the plaintiff to the effect that defendant Mariam A. Patterson is owner of and entitled to receive the fund of \$5174.66 now in the registry of the court, and that the clerk of the court pay said fund to her less his commission for receiving and disbursing the same.

Argument.

THERE IS NO EVIDENCE TO SUSTAIN THE JUDGMENT.

We are here attempting the usually difficult task of asking a reversal of the judgment of the lower

court on the ground that there is no evidence in the record to support the findings upon which the judgment to the effect that the gold of the value of \$5174.66, belongs to H. J. Patterson and his creditors, rather than to Mariam A. Patterson.

The findings and judgment of the lower court appear to have followed inference and suggestion rather than the testimony.

It seems to have been suggested to the court below that the additional 5 per cent to be paid by Hamilton was the consideration to H. J. Patterson for the assignment to Hamilton of the Wickersham lease on an undivided three-quarters of the claim, and was not royalty to be paid the owner of the fourth quarter interest, but there is absolutely no evidence in the record supporting or tending to support this theory. It is merely theory and wholly without substance.

The assignment agreement itself reads (Tr. 72):

“Now therefore this indenture witnesseth that the said H. J. Patterson does hereby lease, demise and sublet unto the said H. C. Hamilton all of the placer mining claim above described, including all his right, title and interest therein held by the said H. J. Patterson as lessee of the said Wickersham and in his own right as owner of an undivided one-fourth part of the title to said mining claim, to have and to hold unto the said H. C. Hamilton for and during the term commencing this day and ending October 12, 1915, upon the same terms, conditions and covenants and subject to the same terms and conditions as in said lease from James Wickersham to said H. J.

Patterson set forth, excepting, however, that the said H. C. Hamilton, shall pay as royalty and rental as such lessee twenty-five per cent of the gross amount of each and every cleanup of gold and dust made by him upon said demised premises to the said James Wickersham, and shall pay in addition thereto five per cent of the gross amount of each and every cleanup of gold and gold dust made by him upon said premises to the said H. J. Patterson.
* * *

H. J. Patterson testified (Tr. 97-98):

“After Wickersham got back to Fairbanks in the fall of 1911 I went to see him for the purpose of getting the deed to the quarter interest and to get a new lease. I asked him to make the deed to Mrs. Patterson, because, as I told him, she had paid for sinking the drill holes. He didn't do that and stated as his reason, ‘I don't want to mix things up. I want to do business with you. I will give you the deed and you can make the deed to whoever you like’. I did not do any mining myself on the Daly Bench in 1911, under the Wickersham lease; there was a controversy over the title to most of that claim, which was compromised, and I had all I could possibly handle at that time on Engineer creek. So I transferred or assigned the lease to Henry C. Hamilton. I received nothing for the assignment of that lease except a promise. Hamilton subleased to the Smith Brothers the upper 250 feet and afterwards went in as a partner with them in working it. He also worked the next, the middle 300 feet. At no time did I receive anything from Hamilton as the proceeds of mining operations carried on by himself or with the Smith Brothers, and I never demanded any part of the proceeds of the royalty when Mr. Hamilton was called upon to pay. Under

the assignment of the lease which I made to Hamilton there was a provision that he should pay as royalty to Wickersham twenty-five per cent of the gross output, but there never was any understanding or agreement with him that I was to receive any part of that royalty."

* * *

and again (Tr. 99):

"I never received any of the five per cent royalty which was reserved to me under this lease to Hamilton. My understanding was that that five per cent was to go to the quarter interest that Wickersham gave to me. The first cleanup of gold made on that ground was in May, 1912, after the water began running. Prior to that time no royalty had accrued under the lease. At the first cleanup Henry T. Ray was present, representing Wickersham; Mr. Hamilton, and Mrs. Patterson and I were also present. Mrs. Patterson then demanded her share of the cleanup, her royalty, five per cent upon the ground that she was the owner of the quarter interest. She did not receive it. Mr. Hamilton said that Mr. Clark had told him there were proceedings started for an injunction and that he didn't feel like that he could give it; and the Smith Brothers they were going to give it to her anyway; and I was afraid of complications and I didn't want to get the others in wrong, and I asked Mr. Hamilton to telephone Mr. Heilig and find out; and he telephoned to Mr. Heilig and told me that Mr. Heilig said there was an injunction against her receiving any money or any royalty."

* * *

and further (Tr. 100):

"At that cleanup I did not demand any part of the royalty nor at any other cleanup. I did not consider myself entitled to any part of the royalty at any of the cleanups. After I received

the deed for the quarter interest from Wickersham I told my wife that he had made the deed to me and that I was very much disappointed the way the thing had to be done and everything, and tried to explain it to her the best I could. I told her I would make a deed to her the next time I went to town. The deed from Wickersham to me was not delivered to me by him until after the settlement of the controversy regarding the title to the ground; and on the 10th of November, 1911, after it was settled, Wickersham and I went to the recorder's office and recorded the agreement settling the controversy regarding the title, and the lease to me and the deed to me. I paid for the recording. Prior to that time I didn't have the deed. On the 27th day of November, 1911, I executed a conveyance of this quarter interest to my wife." * * *

and (Tr. 102):

"Mrs. Patterson did not see any of the documents which were drawn up and signed by me and Wickersham with reference to the Daly Bench before they were executed. She did not see the lease that I made to Hamilton of the quarter interest before it was executed. I told her what I had done and she seemed to be very well satisfied with it. On two occasions I asked Wickersham to make this deed in Mrs. Patterson's name, the second occasion was when he came to make out the deed. I asked him to make the deed to her for she had paid for the sinking of the two holes. I received nothing from Mrs. Patterson at the time I made this deed to her, nor did at any time receive anything from her for this quarter interest. I never sold this quarter interest to her; I considered it merely a transfer; the consideration for the transfer to her of the legal title which stood in my name was because she had paid for the sinking of the drill holes. The

paying of the expense of sinking the drill holes was what my agreement with Wickersham called for as the purchase price of the quarter interest, and it was upon that consideration that I agreed with my wife that if Wickersham made the deed in my name that I would transfer it directly to her."

H. J. Patterson was cross-examined at length as to this 5 per cent (Tr. pp. 118 et seq.) and examined again on redirect (Tr. pp. 140-142) but always testified to the same effect: that the five per cent additional royalty provided for in the sublease agreement was to be paid in consideration for the lease on Mrs. Patterson's quarter interest in the claim.

Mrs. Patterson testified (Tr. 152):

"Q. This lease which Mr. Patterson made to Mr. Hamilton—did you see that at the time it was executed?

A. No, sir.

Q. Were you informed of what provision was made in that lease for the royalty that was to accrue to this quarter interest that you owned?

A. Only that Mr. Patterson told me that he had reserved five per cent for the quarter interest.

Q. Did you assent to that?

A. Yes. Afterwards I made a demand upon Mr. Hamilton while he was operating under that lease for my royalty. I was present at the first cleanup and after he had weighed out Judge Wickersham's royalty and I saw that he was preparing to pour all the rest into a poke, I said: 'Mr. Hamilton, where is my share?' and then he told me that an injunction had been served and he had been instructed

not to pay it to me but to pay it into court until the question of the ownership was decided. Mrs. Hamilton was present at the time. I am not sure but I think I was at all of the cleanups and helped clean some of the dust; Mr. Patterson was in attendance at the same time. Mr. Patterson made no demand at any of those cleanups for royalty from Mr. Hamilton or from the Smith Brothers for himself that I know of." * * *

The language of the sublease agreement, plaintiff's exhibit "E" (Tr. 71) and the testimony of Mr. and Mrs. Patterson constitute all of the evidence in the record upon the question of the ownership of the \$5174.66 in controversy.

Upon this evidence the lower court based its 8th finding (Tr. 39):

"(8) That the defendant Mariam A. Patterson was informed of and had knowledge of the terms and conditions of the lease from said Wickersham to H. J. Patterson, dated 12 October, 1911, and knew the terms and conditions thereof, and had knowledge of the assignment of said lease from said H. J. *Hamilton* to said H. C. Hamilton, dated 27 November, 1911, and assented thereto."

and also its 10th finding (Tr. 40):

"(10) That the said H. J. Patterson did not at any time assign, transfer or set over to the defendant Mariam A. Patterson any of his rights in and to the contract with H. C. Hamilton, wherein said H. J. Patterson reserved to himself five per cent of the gross output of said claim, and no transfer of said five per cent of the gross output of said claim was ever made by said H. J. Patterson to said Mariam Patterson."

and stated in its fourth conclusion (Tr. 43) that Mrs. Patterson had no right, title or interest in the \$5174.66 and rendered judgment (Tr. 47) to that effect, although the court also said in its thirteenth finding (Tr. 41):

“(13) That the deed from H. J. Patterson to Mariam A. Patterson of said undivided one-quarter interest in and to said Daly Bench was made by him and received by her in good faith, for a valuable and sufficient consideration, and without any design on the part of either of them to hinder, delay, or defraud any creditor of the said H. J. Patterson, but for the purpose of vesting in said Mariam A. Patterson the legal title to said undivided one-quarter interest in and to said Daly Bench, said Mariam A. Patterson having theretofore and since the 19th day of September, 1910, been the equitable owner thereof”,

and rendered judgment (Tr. 46) to the same effect.

The court thus found and adjudged that although Mrs. Patterson had been the owner of the quarter interest since September 21, 1910, she had no right to any of the royalty to be paid under a lease made on November 27, 1911, which covered her quarter interest; that because her agent had caused the lease to read that the royalty should be paid to him she had no interest in it and when the agent became a bankrupt the royalty belonged to his creditors.

Where the court below found anything in the record upon which to base a judgment to the effect that Mrs. Patterson was not entitled to the royalty paid on account of her quarter interest, we have been utterly unable to discover. It seems to us that

to put any right to this royalty in Patterson there would be required an assignment from Mrs. Patterson to him, not an assignment from him to her as suggested by the lower court in its tenth finding (Tr. 40). Why should she be required to exhibit an assignment from her agent for what was admittedly her own?

The ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is no more than the shadow following the equitable estate which is the substance.

Pomeroy's Equity, Sec. 147.

In any event Mrs. Patterson was the holder of both legal and equitable title to the quarter interest before any royalties were due for she recorded her deed November 27, 1911. No pay dirt was found until after January 29, 1912 (Tr. 99).

Her ownership entitled her to the rents and royalties subsequently accruing.

Devlin on Real Estate, Secs. 311, 862a, 862c;

Burt v. Ellett, 19 Wall. 544;

Higgins v. California Petroleum and Asphalt Co., 109 Cal. 304;

McConnell v. Pierce, 210 Ill. 627; 71 N. E. 622.

ESTOPPEL.

The court held that Mrs. Patterson was the real bona fide owner for value of an undivided quarter of the "Daly Bench".

The question of her estoppel to claim this ownership as against her husband's creditors is not before this court. This question was settled favorably to Mrs. Patterson by the lower court and from that portion of the judgment no appeal has been taken.

As to the \$5174.66, there is nowhere in pleadings or proof, anything to show that the trustee in bankruptcy ever had the slightest idea that Mrs. Patterson was estopped to claim that the additional 5 per cent provided to be paid by Hamilton belonged to her.

No creditor witness testified that he ever knew or heard of this 5 per cent to be paid by Hamilton. No creditor witness testified he knew such an agreement existed as that under which Hamilton operated the claim.

The theory of the trustee on the trial as evidenced by his pleadings and proof was that the quarter interest in the claim had been transferred to Mrs. Patterson for the purpose of defrauding her husband's creditors.

When the court found against this claim of fraud the trustee seems to have changed his theory to one under which he claimed that though the quarter interest did not belong to Mr. Patterson and could not be subjected to the payment of creditors' claims, the trustee could take possession of the 5 per cent of the gold dust to be paid by Hamilton under his sublease, the trustee taking the position that this 5 per cent was the consideration paid

by Hamilton for the sublease of the Wickersham three-quarters of the claim and that Hamilton was to pay nothing for the lease of Mrs. Patterson's quarter interest.

Blake v. Meadows, 225 Mo. 1; 123 S. W. 868; 30 L. R. A. (N. S.) 1 (and note), was an action by a trustee in bankruptcy to set aside a deed from a bankrupt to his wife. The Supreme Court of Missouri reversed the judgment of the lower court in favor of plaintiff and dismissed the bill and held:

“The conveyance by a bankrupt to his wife of real estate which he had purchased with her funds but held in his own name cannot be interfered with by the bankruptcy trustee, in the absence of anything to estop her from claiming the benefit of the trust.”

THIS IS NOT A “FRAUD” ACTION.

This action, as we are now viewing it, is not a fraud action. The only fraud alleged in the complaint is with reference to the transfer of the quarter interest in the claim by Patterson to his wife; and that she (Tr. 7) by virtue of this fraudulent conveyance claims 5 per cent of the gross output of the claim.

Fraud must be alleged not only specially but specifically.

12 Ruling Case Law, 416;

Magee v. Manhattan Life Ins. Co., 92 U. S. 93.

The court having found and adjudged that this conveyance to Mrs. Patterson was not fraudulent, it follows that her claim to royalty thereunder is not fraudulent. The matter resolves itself into a simple question of title as between H. J. Patterson and Mariam A. Patterson, with no presumptions against the title or rights of Mariam A. Patterson.

We submit that in this view of the situation there is not a "scintilla" of evidence to show any right of title to this 5 per cent in H. J. Patterson. The only testimony on the subject is that the 5 per cent was royalty for mining the quarter interest belonging to Mrs. Patterson.

The result of the judgment below is that Mrs. Patterson's agent and trustee who was in charge of and handling her property receives a royalty of 5 per cent from the entire gold content of the claim one-fourth of which comes out of the quarter interest of Mrs. Patterson, yet Mrs. Patterson gets nothing and the claim is worked out (Tr. 147).

The case is to be viewed as though all reference in the complaint to the ownership of the quarter interest were eliminated and there only appeared therein the allegations (Tr. 6) to the effect that Patterson was by the sublease agreement with Hamilton "entitled to receive" from Hamilton 5 per cent of the gross output of gold from the claim.

The whole question here is whether the 5 per cent belonged to the quarter interest owned by Mrs. Patterson, or to the lease of the three-quarter

interest from Wickersham to Patterson; whether Hamilton was giving the 5 per cent because Patterson assigned to Hamilton the Wickersham lease, or was giving the 5 per cent for the lease on Mrs. Patterson's quarter interest.

If Hamilton agreed to pay Patterson the 5 per cent for Patterson's interest in the Wickersham lease on a three-quarters interest only, then Patterson owns the 5 per cent. If the 5 per cent was partly for the sublease and partly for the lease on the quarter interest the whole 5 per cent would belong to Mrs. Patterson as against her agent and trustee.

If either intentionally or through negligence an agent allows the property of his principal to become so commingled with his own that they cannot be separated the whole must be surrendered by him to the principal.

Clark and Skyles Law of Agency, Sec. 421;

Yates v. Arden, 5 Cranch C. C. 526; Federal
Case No. 18126;

Marine Bank v. Fulton, 2 Wall. 252.

"Every doubt will be resolved in the principal's favor; and if the two sums cannot be distinguished the agent must satisfy to the full every legal or equitable claim of the principal even to the extent, if that should be necessary, of giving the whole fund or mass to the principal."

Corpus Juris, Vol. 2, p. 742.

This burden is also on the agent's creditors and representatives.

Hooley v. Gieve, 9 Abb. N. Cases (N. Y.) 8.

Patterson held the legal title to the quarter interest in trust for his wife.

Why should a meaning be put on the sublease agreement with Hamilton that would deprive the trustor of her entire interest in the subject matter of the trust and vest it in the trustee?

The losses to the creditors of Patterson, the trustee, seem to have hidden from the court the rights of the trustor as against her trustee.

That portion of the judgment of the lower court to the effect that Mariam A. Patterson is not the owner of the gold dust valued at \$5174.66 should be reversed.

Dated, San Francisco,
May 12, 1917.

Respectfully submitted,

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